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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 703

EDGAR F. SMITH, *Petitioner*,

v.

FREDERICK O. MERCER, Chief Judge of the United States District Court for the Southern District of Illinois, *Respondent*.

## REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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1. The Government argues that dismissal before trial is too drastic a remedy for deprivation of the accused's rights to consult counsel and to have a preliminary examination, but it does not even suggest how, otherwise, violation can be remedied or future compliance with the Rules insured. According to the Government, federal courts are to blink conceded violations of the Constitution and laws of the United States by the Commissioner, by the Marshal and by the trial court lest an accused private citizen who may conceivably be proved guilty escape trial on the merits. Unless we misread this Court's decisions, that is exactly what the imperative of judicial integrity will not permit. The Government does not even pretend to deny that if dismissal before trial is the only effective, and therefore the appropriate, remedy, mandamus must lie to expunge arbitrary refusal. Unless justice is as alert to stop lawless prosecution as it is to facilitate lawful

prosecution it does not "satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14.

2. The contention (op. p. 8; memo. p. 2) that petitioner must stand trial anyway on counts two and three assumes that if petitioner had not been illegally deprived of preliminary examination the Grand Jury would have indicted on those counts. But those counts are admittedly based on the testimony of the same two witnesses, alleging continuing receipts from the same source, as count one (A3-A9). If, in consequence of cross examination of those witnesses or of defendant's presentation at a preliminary hearing, the Grand Jury had refused to indict on count one, it would inevitably have refused to indict on counts two and three as well. Indeed the prosecution may have been dropped altogether, for the Government itself treated the accusations as inextricably interwoven (A-4). Thus, the illegal deprivation of preliminary hearing necessarily taints the entire indictment.

## CONCLUSION

By reason of the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 3, 1962